Filed 2/25/16 Marriage of Checcone CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| In re the Marriage of SUSIE KIM CHECCONE and EMIDIO CHECCONE.<br>_____<br>SUSIE KIM CHECCONE,<br>Appellant,<br>v.<br>EMIDIO CHECCONE,<br>Respondent. | B263584<br>(Los Angeles County Super. Ct. No. BD548367) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark A. Juhas, Judge. Affirmed in part and reversed in part.

Liner, Scott K. Robinson, and Adam T. Cain for Appellant.

Buter, Buzard, Fishbein & Royce and Gary Fishbein for Respondent.

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In this marital dissolution case, Susie Kim Checcone appeals from the trial court's post-judgment order allocating certain tax obligations of the parties as set forth in the stipulated judgment. Because the trial court's decision is inconsistent with the language of the stipulated judgment, we reverse the order.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Settlement Agreement and Stipulated Judgment*

Susie Kim Checcone (Susie) and Emidio Checcone (Emidio)[1] were married on September 3, 2000 and separated on July 6, 2011. In October 2013, the parties commenced trial in their marital dissolution case. On October 3, 2013, before conclusion of the trial, the parties entered into a detailed settlement agreement on the record, agreeing to set forth their settlement in a written stipulated judgment. For four months, the parties circulated competing drafts of the judgment, arguing over the form and substance of the provisions. The parties' negotiations culminated in a full-day session in the trial court's jury room on February 23, 2014, which resulted in the parties signing and filing a judgment.

#### 1. *Huber Funds*

During the marriage, the parties invested $500,000 for a 5 percent interest in Huber Capital Management, LLC (Huber), a start-up company managed by Emidio's then employer. On March 20, 2013, Emidio was terminated from Huber and the company exercised its repurchase right, purchasing the parties' investment in Huber for $1,603,961.60 and paying out a dividend in the sum of $67,454.60. Throughout the marital dissolution proceedings, and negotiations regarding the settlement, Emidio retained control over the Huber funds, stating that he did not want to divide the funds until the tax liability issues were resolved, while Susie continuously requested immediate division of the funds.

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[1] Because the parties share a last name, we will refer to them by their first names to avoid confusion. No disrespect is intended.

The stipulated judgment contains multiple, detailed paragraphs regarding the tax obligations of the parties with respect to the Huber funds. Specifically, section 3.3.2.3 provides that Emidio and Susie shall each pay "one-half of the taxes on the Huber funds consisting of capital gains taxes on the $1,613,961.60 equity cash out (minus the $500,000 initial investment paid by the parties for their interest, the capital gains taxes shall be payable on the $1,103,961.60 gain) and income taxes on the $67,454.60 dividend payment." It also notes that the parties agree "they will fully cooperate to ensure that the taxes are equally paid, and shall promptly share their relevant tax information relating thereto to each other."

2. *Union Bank Funds*

Per section 5.2 of the judgment, the parties agreed that Emidio would pay Susie an equalization payment of $5,813.16 in connection with the division of two Union Bank accounts ending in 2800 and 5895. The judgment noted that this equalization payment "shall be tax free to Susie" pursuant to Internal Revenue Code section 1041. The judgment also stated that "Emidio disputes this allocation to Susie." Despite this dispute, however, the parties, and thereafter the court, signed the stipulated judgment filed on February 24, 2014.

C. *Post-Judgment Motions*

1. *Emidio's Family Code Section 2122 Set-Aside Motion*

In April 2014, Emidio filed a motion to set aside portions of the judgment, pursuant to Family Code section 2122, subsection (e), claiming that several aspects of the judgment were erroneous and resulted in an inequitable division of property. Of the purported mistakes in the judgment, only two relate to this appeal. First, Emidio alleged that the entire parenthetical in section 3.3.2.3,[2] relating to the Huber funds, should have

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[2] The parenthetical is in the following sentence: "The parties shall each pay for one-half of the taxes on the Huber funds consisting of capital gains taxes on the $1,613,961.60 equity cash out (minus $500,000 initial investment paid by the parties for

been removed, and "was agreed to be removed while the parties were in the jury room finalizing the document. However, it was not removed and [Emidio] did not catch the mistake." Second, Emidio alleged that paragraph 5.2 of the judgment required Emidio to make an equalizing payment to Susie of $5,813.16 in connection with bank accounts ending in 2800 and 5895. Those accounts, however, Emidio claimed, were his separate property and were opened post-separation, and Susie was aware of that fact. Emidio alleged that it was a mistake to include those accounts in the judgment, and the court should strike that portion of the judgment to avoid injustice.

The trial court denied Emidio's motion, noting that if he "wanted to correct any errors [in the stipulated judgment] the burden fell to him to do so during the negotiation process." The trial court further found that his failure "to correct any errors means that he essentially ratified the errors or, they were part of the negotiation process of reaching a compromise."

2. *Susie's Request For Order*

On September 9, 2014, Susie filed a motion seeking an order that Emidio pay her half of the Huber funds. On November 14, 2014, Emidio filed a response, contending that Susie's request for half of the funds failed to account for her portion of the tax burden as outlined in the judgment. Susie objected to Emidio's response, claiming that it was barred by the doctrine of res judicata because Emidio proffered identical arguments in his set-aside motion, under Family Code section 2122, which the court had denied. Emidio disagreed, stating that he was not requesting that the subject language be stricken. Rather, he was requesting the court to properly interpret the language in the judgment regarding the tax allocations of the Huber funds. Each party filed their own declarations, that of their attorneys, and of their competing accountants, who had analyzed the parties' respective tax obligations based on their different readings of the language in the

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their interest, the capital gains taxes shall be payable on the $1,103,961.60 gain) and income taxes on the $67,454.60 dividend payment."

judgment. Susie filed a motion to strike the declarations Emidio submitted. The court never ruled on that motion, finding it unnecessary.

On February 9, 2015, the trial court held a hearing on Susie's request for order. Ten days later, the trial court issued its ruling. The trial court held that it had not previously ruled on the submitted issues, and therefore, Emidio was not barred from raising them. It noted that the parties "*clearly* contemplated that the tax burden on the 'Huber funds' would be borne equally by the parties." Accordingly, it found that the notation in the judgment of $500,000 was a place-holder and not the actual agreed-upon cost basis for tax purposes because the "true cost basis was not known at the time of the judgment negotiations," but "[n]ow that some time has passed" the cost basis "as determined by the IRS" is $314,255. As a result, the trial court found that Emidio owed Susie $247,010 of the Huber funds (and not $312,000 as Susie claimed by using $500,000 as the cost basis as set forth in the parties' agreement).

Turning to whether Susie should be liable for half the taxes on the Union Bank funds, the trial court found that, since "the parties seemingly are in agreement that these funds" were Emidio's separate property, the language of section 5.2 in the judgment, which stated that these monies "shall be tax free to Susie" pursuant to Internal Revenue Code section 1041, was inapplicable because that code section does not apply to separate property. The trial court also sua sponte referenced paragraph 10.11 of the judgment, which provided that each party shall be solely responsible for the taxes of assets awarded to that party. Relying on this provision of the judgment, the trial court found that the parties contemplated that when a party received funds pursuant to the judgment, that party should bear the tax burden of those funds. Accordingly, the trial court found that Susie was responsible for the taxes on the $5,813.16.

Susie timely appealed the trial court's ruling.

## DISCUSSION

This appeal raises two straight-forward issues: (1) was the trial court's February 2015 order barred by the doctrine of res judicata; and (2) if that order was not barred, did the trial court properly interpret the language of the judgment.

### A. *The Trial Court's February 2015 Order Was Not Barred By Res Judicata*

Susie claims that the trial court's February 2015 order should be reversed because the court already ruled on the exact issues in its April 2014 order. The trial court held that it did not previously rule on the issues and Emidio was, therefore, not barred from raising them in response to Susie's request for order.

Res judicata, or issue preclusion,[3] bars the relitigation of issues that were litigated in an earlier proceeding and decided adversely to the party against whom the doctrine is asserted. (*Ferraro v. Camarlinghi*, *supra*, 161 Cal.App.4th at pp. 531-532.) The application of the doctrine requires that: (1) the issues in the two matters be identical; (2) they were actually litigated and decided in the prior proceeding; and (3) the prior proceeding must have resulted in a final decision on the merits. (*Ibid*.)

The issues raised by Emidio in his April 2014 motion to set aside the judgment based on mistake meet none of the above criteria. In the set-aside motion, Emidio sought to have the court strike the parenthetical in section 3.3.2.3 relating to the Huber funds. Similarly, he argued that paragraph 5.2 of the judgment, which required Emidio to make an equalizing payment to Susie of $5,813.16 in connection to the Union Bank funds, was a mistake, and should also be excised, because the funds were his separate property and Susie was not entitled to them. In contrast, the issues in February 2015 on

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[3] "The preclusive effects of a prior judgment or similar adjudication—traditionally known as res judicata—are of two distinct kinds: claim preclusion and issue preclusion." (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 530.) Susie's arguments on appeal focus on issue preclusion, and we, therefore, limit our discussion to issue preclusion.

Susie's request for order motion were the parties' tax burdens with respect to the Huber funds and the Union Bank funds. Emidio did not argue that those provisions of the judgment were a mistake and should be excised from the judgment. To the contrary, Emidio accepted those provisions but proposed a different interpretation than Susie. Accordingly, Emidio's arguments were not barred by the doctrine of res judicata, and we, therefore, affirm the trial court's judgment.

B. *The Trial Court Erred In Assessing The Parties' Respective Tax Burdens*

1. *Hubert Funds*

The trial court held that Susie's half of the Huber funds must include her equal share of the tax burden based on the actual cost basis rather than the tax calculation provided in the stipulated judgment. Because the method of calculating the taxes on the Huber funds is specifically outlined in the agreement, we reverse the trial court's order.

Here, each party submits competing interpretations of the judgment language in allocating the tax burden on the Hubert funds. Susie argues that that judgment itself contained all of the information necessary to calculate the tax burden on each party. Susie notes that the judgment states that the "parties shall each pay one-half of the taxes on the Huber funds *consisting of* capital gains taxes on the $1,613,961.60 equity cash out (minus $500,000 initial investment paid by the parties for their interest, the capital gains taxes shall be payable on the $1,103,961.60 gain) and income taxes on the $67,454.60 dividend payment." (Italics added.) Susie argues that the judgment is specific and unambiguous, and "parties in a family law matter can agree to divide the payment of taxes in any manner agreed upon by the parties."

In contrast, Emidio argues that because the cost basis could not have been determined at the time of the judgment, the $500,000 initial investment number stated in the judgment was only a place-holder, because he had yet to receive his 2013 K-1, which would determine the actual cost basis. And, according to his 2013 K-1, the basis was actually $314,255, not $500,000. According to Emidio, the IRS will use this lower cost

basis to calculate taxes, and Susie's half of the Huber funds, per the judgment, must include her equal share of the tax burden. Therefore, Emidio argues, to avoid a windfall for Susie, she should receive $247,000 of the Huber funds, approximately $65,000 less than Susie claimed.

Marital settlement agreements are construed under the rules governing the interpretations of contracts generally. (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) Where the language is clear, and there is no ambiguity, the court will enforce the express language. (*Id.* at p. 1440.) Extrinsic evidence of the parties' intentions is inadmissible to vary or modify the terms of an unambiguous agreement. (*Ibid.*) Moreover, when parties mutually agree upon a property division, the law does not require them to divide their property equally. (*Mejia v. Reed* (2003) 31 Cal.4th 657, 666.)

Here, the language of the settlement sets out a precise calculation for assessing how the parties would determine the taxes for the Hubert funds. After applying this calculation, the parties would each pay half of the taxes. There is no mention in the agreement of the actual cost basis, IRS determinations or alternative methods of calculation. Nor does the settlement indicate that the parties would revisit the method of calculation at a future date. For the purposes of their settlement, it is irrelevant if Emidio had yet to receive his 2013 K-1 or if the IRS cost basis determination differed from their agreed-upon cost basis determination because, in family law matters, parties may divide the payment of taxes in the manner they agree upon. The parties spent four months negotiating the agreement and were represented by counsel. The trial court did not, nor do we, find any ambiguity in the stipulated judgment that would allow for the extrinsic evidence of the parties' intentions to vary the method of calculation. Accordingly, we reverse the trial court's order and hold that Susie's tax burden on the Hubert funds must be based on the calculation set out in the judgment, specifically, "one-half of the taxes on the Huber Funds consisting of capital gains taxes on the $1,613,961.60 equity cash out (minus $500,000 initial investment paid by the parties for their interest, the capital gains

taxes shall be payable on the $1,103,961.60 gain) and income taxes on the $67,454.60 dividend payment."

2. *Union Bank Funds*

The trial court found that Susie was required to pay her share of the taxes on the Union Bank funds.

Susie argues that, based on the plain language of the judgment, the Union Bank funds were awarded "tax-free." In contrast, Emidio argues that Susie is required to pay her share of the taxes on the $5,813.16 because the Internal Revenue Code provision referenced in the judgment applies to inter-community transfers of after-tax assets and not transfers of separate property like the funds at issue here.

The plain, unambiguous language of the stipulated judgment states that Emidio shall pay Susie $5,813.16 of the Union Bank funds and it "shall be tax free." There is no qualifying language regarding whether the funds were community or separate property. Although the settlement also included an incorrect reference to the Internal Revenue Service Code, the plain language of the settlement states that Susie will get the funds tax free. Nor does it matter whether the funds were community or separate property or whether Emidio disputed their classification because the parties are free to divide their property as they see fit. Accordingly, we reverse the trial court's finding, and hold that Susie does not bear the tax burden on the "tax free" Union Bank funds.

## DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for recalculations as specified herein. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.